STATE OF MICHIGAN

IN THE SUPREME COURT OF THE STATE OF MICHIGAN

Court Of Appeals Case No. 306361

Wayne County Circuit
Court No. 07-726774-Cz

ACORN INVESTMENT CO.

Plaintiff/ Appellant
vs.

MICHIGAN BASIC PROPERTY INSURANCE ASSOCIATION
~~AN UNINCORPORATED ASSOCIATION~~

Defendant/ Appellee

JAMES C. KLEMANSKI (P24483)
Attorney for Plaintiff/ Appellant
2240 Livernois Rd.
Troy, Michigan 48083
(248) 524-0000 X222

JOHN D. HONEYMAN (P26380)
Attorney for Defendant/ Appellee
PATRICK, JOHNSON & MOTT, P.C
27777 Franklin Road, Suite 1400
Southfield, Michigan 48034
(248) 356-8590

PLAINTIFF/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL TO THE MICHIGAN SUPREME COURT

ORAL ARGUMENT REQUESTED

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STATEMENT IDENTIFYING THE JUDGMENT OR ORDER APPEALED FROM

Acorn Investment Co., the Plaintiff/Appellant is appealing the decision of the Court of Appeals case No. 306361 that was released on November 27,2012 for publication.

The Plaintiff/Appellant is asking that the decision of the Wayne County Circuit Court and the Court of Appeals be reversed.

Grounds For The Supreme Court To Grant Leave To Appeal

The issues presented involve legal principals of major significance to Michigan's jurisprudence especially since the opinion of the Acorn Appeals Court panel is going to be published and will be precedent in future cases .

1.Specifically, an issue of first impression that Acorn asks leave of the Supreme Court to decide is that if a court determines that an insured has coverage by a motion for summary disposition , MCR 2.116(C)(10), after case evaluation but before trial, leaving only the issue of damages to be determined, is using a Alternative Dispute Resolution (ADR) appraisal, per MCR 2.410, by stipulation of the parties ,instead of judicial determination of damages, a "verdict" under MCR 2.403(O)(2)(c) which entitle Acorn to case evaluation sanctions?

2. Also, an issue of first impression which are grounds for the Supreme Court to grant Leave to Appeal is that incidental coverage under an insurance contract for an appraisal panel to decide under MCL 500.2833(1)(m) or a court ?

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1.Did Plaintiff/Appellant obtain a "verdict" under MCR 2.403(O)(2)(c) entitling it to case evaluation sanctions?

2. Has Plaintiff/Appellant waived its claim for debris removal expenses?

PLAINTIFF/APPELLANT'S ARGUMENTS SUPPORTING ITS REQUEST FOR LEAVE TO APPEAL TO THE MICHIGAN SUPREME COURT

Basic Facts and Procedural History

On April 10, 2007, Plaintiff/Appellant, Acorn Investment Co., hereinafter referred to as "**Acorn**" submitted an application to the Defendant/Appellee, Michigan Basic Property Insurance Association hereinafter referred to as "**the Association**", requesting fire insurance for the property located at 12826 Marlowe in the City of Detroit ("the Property"). The Association then issued Acorn Policy No. 4587875, which provided fire insurance for the Property for the period from April 11, 2007 to April 11, 2008 ("the Policy").

On May 27, 2007, a fire occurred at the property causing significant damage. Acorn filed a claim, which was formally denied on the ground that the Policy was cancelled as of May 16, 2007 and thus, that the Policy was not in force at the time of loss.

On October 5, 2007, Acorn filed suit against the Association, and this very lengthy matter ensued. Acorn subsequently brought a motion for Summary Disposition on June 27, 2008 seeking a declaration that the Association was required to provide coverage based on the Installment Payment Notice. In response, the Association filed a Counter-Motion for Summary Disposition, insisting that coverage should not be afforded on the basis of the Cancellation Notice, which, according to the Association, effectively cancelled the Policy on May 16, 2007. The trial court denied both motions on the ground that a question of fact existed on September 25, 2008.

On November 4, 2008 case evaluation was held and an award was granted for $11,000 in Plaintiff's favor. Acorn accepted the award and the Association rejected the award. Ex. #1. That rejection necessitated further legal proceedings.

On May 20, 2009, Acorn filed a second Motion to Dismiss the Association's cancellation defense on the basis that the Association's based upon the additional legal basis that the Association's notice of cancellation did not conform to the statutory requirement regarding advising the insured of return of unearned premium. The trial court granted the summary disposition motion by an order entered on July 14, 2009. Ex. #2.

On June 19, 2009 the trial court granted Acorn's Motion *in Limine* ruling that the actual cash value of the fire damage should only be determined by replacement cost less depreciation. Ex. #3.

On November 19, 2009 the Trial Court granted Acorn's motion to dismiss the Association's additional affirmative defense of misrepresentation, and issued an order. Ex. #4

Thereafter, Acorn filed a Motion to refer the issue of damages to an Appraisal proceeding and to appoint the neutral (Umpire) in this three person process as allowed by the policy of insurance and the enabling statute MCL 500.2833 (m). The Trial Court took the matter under advisement and while that issue was pending, on January 19, 2010 by agreement of the parties and with the approval of the Trial Court the parties agreed to the appraisal procedure and agreed to have Mr. Richard Guider act as the Umpire.

On May 20, 2010 an order was issued by the trial court for an appointment of an umpire and an order for instructions to the appraisal panel to only use as actual cash value, replacement cost of the property less depreciation, reflecting the lower court's order of June 19, 2009. Ex. #5

On September 17, 2010 an appraisal award was issued for the actual cash value of the loss in the amount of $20,877. Ex. #6. The Association ignored the entry of the Award; took no action as to the entry of the Appraisal Award; make no payment and did filed no pleadings relating to the Award. Acorn, upon receipt of the Award, wrote to the Umpire complaining that the Appraisal Panel had ignored the debris removal portion of the coverage and claim. Ex # 7.

In response to the Association's failure to pay the Appraisal Award on the dwelling and in response to the Appraisal panel's failure to evaluate the debris removal portion of the insurance coverage, Acorn filed a motion for entry of Judgment; for assessment of UTPA interest; for case evaluation costs; and for debris removal expenses on November 16, 2010. Ex. #8.

On December 3, 2010 the trial court issued an order granting Plaintiff's Motion For Entry of Judgment and Interest. The judgment amount was $20,877 and the interest to the date of the order was $8,391.96. Ex.#9.

On December 16, 2010 the trial court signed orders denying Acorn's motions for assessment of case evaluation costs and assessment of debris removal expense as part of the Judgment. The order denying Acorn's motion for case evaluation sanctions resolved the last pending claim and closed the case. Ex. #10.

On September 23, 2011 the trial court denied Acorn's Motion for Reconsideration of the order denying Acorn's Motion for Assessment of Case Evaluation Costs for the assessment of the value for debris removal. Ex. #11

On November 27, 2012 the Acorn Court of Appeals panel, hereinafter referred to as "**the Acorn Court**" issued its opinion for publication, No. 306361 affirming the Trial Court in that Acorn did not obtain a "verdict" entitling it to case evaluation sanctions under MCR 2.403(O)(2)(c) and that Acorn had waived its claim for debris removal expenses. Ex. #12.

ANALYSIS

I. Acorn Is Entitled To Case Evaluation Sanctions Under 2.403(O)(2)(c)

A. Introduction- Issue of First Impression

An issue of first impression that Acorn asks leave of the Supreme Court to decide is that if a court determines that an insured has coverage by a motion for summary disposition , MCR 2.116(C)(10), after case evaluation but before trial, leaving only the issue of damages to be determined, is using a Alternative Dispute Resolution (ADR) appraisal, per MCR 2.410, by stipulation of the parties ,instead of judicial determination of damages, a "verdict" under MCR 2.403(O)(2)(c) which entitle Acorn to case evaluation sanctions?

B. The Court Rule

MCR 2.403(O) titled "Rejecting Party's Liability for Costs" states the following:

(1) If a party has rejected an evaluation and the action proceeds **to**

verdict that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the evaluation.

(2) For the purpose of this rule "verdict" includes,

(a) a jury verdict,

(b) a judgment by the court after a nonjury trial,

(c) a **judgment entered as a result of a ruling on a motion after rejection of the case evaluation**. (emphasis added).

C. If The Issue of Damages Is Decided By Appraisal Instead Of By Judicial Determination, Acorn Should Not Be Denied Case Evaluation Sanctions.

The statute providing for appraisal, was intended as a simple, inexpensive, and prompt alternative to judicial determination of damages. Courts determine matters of coverage under an insurance agreement, but the amount of loss as determined by the appraisers is conclusive. Auto *-Owners Ins Co v Kwaiser*, 190 Mich. App. 482, 487-488; 476 N.W.2d 467 (1991)*).* However, once coverage is denied the dispute between the insured and the insurer is one primarily concerning whether or not there is coverage. In the instant case Acorn filed a claim with the Association which the Association denied on the basis that the policy had been canceled. Acorn then filed an action against the Association and case evaluation followed and an award was granted of $11,000 which Acorn accepted and the Association rejected. Acorn was granted summary disposition under MCR 2.116 (C)(10) after case evaluation, the Trial Court ruling that the Association's notice of cancellation was insufficient to cancel the policy. In Johnson *v State Farm Mutual Auto Ins Co,* 183 Mich. App. 752, 767-769; 455 N.W.2d 420 (1990), this Court addressed the issue whether mediation sanctions (now case evaluation

sanctions) may be imposed when a case is summarily decided on a motion after mediation but before the commencement of trial. The Court found that the Court Rule , MCR 2.403(O)(2)(c), intended to include those cases which disposed of summarily by motion following mediation but prior to the commencement of trial.

MCR 2.116 (C)(10), states that Acorn is entitled to a judgment if except for the amount of damages there is no genuine issue to any material fact. The lower court ruled that Acorn had insurance coverage in a summary disposition motion under MCR 2.116(C)(10) . The only issue left was one of damages, which instead of a jury deciding, Acorn and the Association stipulated to have an appraisal panel decide the damage issue i.e. *actual cash value or amount of the loss.*

Therefore, according to the Acorn Court, if Acorn would have let the jury decide the issue of damages it would have been a "verdict" and Acorn would be entitled to case evaluation sanctions. However, because Acorn stipulated to use the approved alternative of appraisal instead of taking up valuable judicial resources with a jury trial only on the issue of damages, it is being penalized.

Acorn asserts that this is not what the Supreme Court intended when it changed the court rule, MCR 2.403(O)(2)to a judgment entered as a result of a ruling on a motion after rejection of the case evaluation. MCR 2.410 , Alternative Dispute Resolution, specifically states under (A)(1) All civil cases are subject to alternative dispute resolution processes unless otherwise provided by statute or court rule. (A)(2) states in part that for the purposes of this rule, alternative dispute resolution (ADR) means any process designed to resolve a legal dispute in the place of court adjudication, and includes any process *ordered on stipulation of the parties.* In the

instant case, appraisal was stipulated after it was determined Acorn had insurance coverage . Acorn urges this Honorable Court to continue to encourage the ADR procedures and to not punish Acorn for participating in the Appraisal procedure. Denying the opportunity to recover Case Evaluation Costs would most assuredly discourage any litigant from resorting to ADR in any post case litigation. Certainly no party would proceed with ADR if the result is the loss of the benefits under MCR 2.403(O).

D. The Appraisal Process Is Not A Voluntary Arbitration

Given the history of this case, it is doubtful that we can equate this contested Appraisal proceeding with a voluntary arbitration as the Acorn Court has found. There are differences between the statutory Appraisal process and a voluntary arbitration proceeding. The two methods of dispute resolution are very different and generally should be recognized as such. Most importantly, while an arbitration of a dispute often results in a resolution of the entire dispute, appraisal does not. Appraisal is limited by statute, MCL 2.833(1)(m) to a resolution of the "amount of loss" and, absent special agreement by both parties, cannot resolve other aspects of the dispute. Appraisals, unlike arbitrations, are not intended to resolve entire disputes and, therefore, courts necessarily have a role in reviewing the appraisers' determinations to ensure that they are consistent with the legal principles controlling the parties' insurance relationship. In contrast, generally an arbitration award can be reviewed by courts only to determine whether it was procured by corruption, fraud or undue means or where the arbitrators exceeded their powers. Here, as only the amount of loss is within the scope of appraisal, questions of law must ultimately be reviewed and resolved in court.

See 5-48 New Appleman on Insurance Law Library Edition § 48.03 [2] Distinctions Between Appraisal and Arbitration.

E. The Trial Court's Duties Were More Than Just Confirming The Appraisal Award.

The Acorn Court in Its opinion found that the appraisal process was effectively an **arbitration** and leapt to the conclusion that an order entered pursuant to such was not a verdict within the meaning of MCR 2.403(O)(2)(c). It found that the Trial Court's Judgment that granted Plaintiff's Motion for Entry of Judgment just confirmed the appraisal award and did not constitute a verdict under MCR 2.403(O)(2)(c), and thus the trial court properly denied Acorn's case evaluation sanctions request.

The Acorn Court is incorrect for the two reasons stated below. In *Tokar v. Estate of Tokar,* 258 Mich. App. 350, 353; 671 N.W.2d 139 (2003) the Court of Appeals ruled that the trial court's supremacy in all arbitrated actions is clearly established in the statute and court rule governing arbitration. A stipulated agreement to arbitrate is subject to Mich. Comp. Laws § 600.5001 et seq. Under Mich. Comp. Laws § 600.5025, the trial courts have jurisdiction to enforce an arbitration agreement and render judgment on an award. The trial court's enforcement and review of arbitration agreements and awards are governed by MCR 3.602. First an arbitration governed by the rule must be filed with the clerk of the court. MCR 3.602(I). Once so filed then the Court may "confirm" the award.

Accepting what Acorn believes to be the false premise adopted by the Acorn Court, MCR 3.602 states under subsection (L) entitled *Judgment* that "The Court shall

render judgment giving effect to the award as corrected, confirmed, or modified. *The judgment has the same force and effect, and may be enforced in the same manner as other judgments.*" (emphasis added) The *Tokar Court, supra* ruled that

> These rules clarify the relationship between the trial court and the arbitration process. Unless the trial court vacates an arbitration award, it must enter a judgment on the award as corrected, confirmed, or modified. *But equally clear is the fact that an arbitration award depends on the trial court to give it effect. The arbitration award is not effective until the trial court enters judgment on it.* (Emphasis added.)

Even if it is conceded that the Acorn Court correctly concluded that the appraisal process was effectively an arbitration, and that both parties agreed to submit this case to an appraisal panel to determine the value of Acorn's loss; it must be also conceded that in the face of the Association's refusal to voluntarily honor the Award; only the trial court had jurisdiction to give the award effect, enforce the appraisal agreement and to render judgment on the award as corrected, confirmed or modified under the *Tokar supra* decision. These duties of the trial court are more than just confirming the award as the Acorn Court has decided.

However, Acorn submits that the parties certainly did not consider the Appraisal Award to be the equivalent of an Arbitration Award as neither filed the Award with the Clerk of the Court. Neither party argued in the Trial Court that the requirements of MCR 3.602 applied to the Appraisal Award. The arbitration statute only refers to such agreements as fix upon some designated court in which judgment shall be entered on the award. *See Petorovski v. Nestorovski (In re Estate of Nestorovski),* 283 Mich. App. 177 , 198 (2009) This filing of an award is not a part of the Appraisal proceeding

governed by the Insurance Code of 1956, MCL 500.2833(1)(m) which requires the award be submitted in writing to the insurer. The Insurance Code further requires that ". . . losses be paid within 30 days of receipt of proof of the amount of loss, notwithstanding the provision of any contract or statute to the contrary." MCL 500.2833(p) and MCL 500.2836.

Clearly the Association breached its contractual and statutory obligations with regard to payment of the Appraisal Award and Acorn was compelled to enforce its rights to payment by the obtaining of a verdict as was contemplated by MCR 2.403(2)(c). Therefore, the legal effort to obtain a judgment was necessitated not only by the rejection of the case evaluation award but also by the refusal to pay the amount of loss as established by the appraisal process and as required by the Insurance Code of 1956. Arbitration proceedings and Appraisal proceedings cannot be equated under these circumstances. In addition, Acorn obtained a verdict that was distinctly different from the Appraisal Award, in that the judgment included interest under the Uniform Trade Practices Act, MCL 500.2006.

It is finally noted that the Acorn Court's decision is influenced by prior case law under the earlier version of the case evaluation rule. Acorn urges this Court to render a decision under the language of the current rule.

F. The Plain Language of MCR 2.403(O) Makes Acorn's Judgment A "Verdict" Entitling Acorn To Case Evaluation Costs

As this Court has expressed in *Marketos v. Am. Emplrs. Ins. Co.,* 465 Mich. 407, 413; 633 N.W.2d 371 (2001) in construing MCR 2.403(O), that when called on to interpret a court rule, the Court applies the legal principles that govern the construction and application of statutes. Accordingly, it begins with the plain language of the court

rule. When that language is unambiguous, it must enforce the plain meaning expressed, without further judicial construction or interpretation. Similarly, common words must be understood to have their everyday, plain meaning. The plain language of the court rule, MCR 2.403(O)(2)(c), states that a "verdict" is a judgment entered as a result of a ruling on a motion after rejection of the case evaluation. The plain language of the order entered by the trial court on December 3, 2010 as a result of a ruling on Acorn's dispositive motion of November 16, 2010 for entry of judgment on the appraisal award and for assessment of UTPA interest, made the order a "verdict" under the current version of MCR 2.403(O)(2)(c).

In viewing the plain language of MCR 2.403(O) Acorn urges this Court to implement the mandatory language, *i.e.* the rejecting party *must* pay the opposing party's actual costs.(Emphasis added.) There is nothing unusual in the process used to resolve this matter after the case evaluation. Acorn requests that this Court enforce the plain language of the court rule and to implement the purposes of the rule. *Haliw v. City of Sterling Heights, 257 Mich. App. 689, 669 N.W.2d 563 (2003); revised as to the issue of appellate attorney fees 471 Mich. 700; 691 N.W.2d 753 (2005).*

G. The Acorn Judgment Award Of $20,877 Is A Verdict Under MCR 2.403(O) Because It Represents A Finding Of The Amount Acorn Should Be Awarded

The Supreme Court also found in *Marketos v. Am. Emplrs.* Ins. Co., 465 Mich. 407, 414 (2001) that for purposes of awarding sanctions under MCR 2.403(O), a "verdict" must represent a finding of the amount that the prevailing party should be awarded. The Court of Appeals in *Topar supra* decided that the amount the prevailing party should be awarded as determined by the arbitration panel has no effect until the trial court gives it effect by a judgment. Therefore, the judgment award of $20,877

entered by the trial court on December 3, 2010 is a "verdict" under MCR 2.403(O) because it represents a finding by the trial court of the amount that Acorn should be awarded as corrected, confirmed, or modified.

Moreover, this amount is different from the Appraisal Award in that it includes the finding and determination of interest as contemplated by MCL 500.2006. Therefore, the verdict entered by the Trial Court is distinctly different from the Appraisal Award and is more that the mere confirmation of that Award.

H. None Of The Cases Cited By The Acorn Court Are Relevant To The Issue Of Whether The Judgment Entered By The Trial Court Is A Verdict

The Acorn Court has decided that an order or judgment entered following arbitration does not constitute a "verdict" within the meaning of MCR 2.403(O) citing three Court of Appeals published cases to support of its position. None of the cases cited by the Acorn Court are relevant to the issue of whether a judgment confirming an arbitration award is a "verdict" under the present version of MCR 2.403(O)(2)(c).

The first case cited by the Acorn Court, *Saint George Greek Orthodox Church of Southgate, Mich v Laupmanis Assoc, PC*, 204 Mich App 278; 514 N.W.2d 516 (1994) does not in any way stand for the proposition that a judgment confirming the arbitration award **entered as a result of a ruling on a motion after rejection of the case evaluation is not a "verdict".** The Acorn Court in footnote 2 admits that the arbitration conducted by the *St. George* case did not satisfy the previous "proceeds to trial" requirement. However, the Acorn Court admits that the current version of MCR 2.403(O)(1) uses the phrase "proceeds to verdict". The Acorn Court then attempts to expand by judicial fiat, the specific and precisely worded definition of "verdict" in MCR 2.403. The Acorn Court, citing *St. George, supra*, states that "'MCR 2.403 was designed

to expedite and simplify the final settlement of cases to avoid a trial[,]" and that the parties in this case were attempting to effectuate that purpose by working "within the framework of arbitration and the arbitration award.'" Thus, the Acorn Court reasoned the arbitration award was not a "verdict". Acorn disputes that the Association was attempting to effectuate the purposes of MCR 2. 403(O). Its refusal to voluntarily pay the loss amount as mandated by MCL 500.2833 and MCL 500.2836 indicate a purpose to frustrate any settlement process and to increase the legal cost to Acorn.

The Acorn Court is attempting to expand or read additional meaning into MCR 2.403(2)(c). However, the Court of Appeals has consistently rejected attempts to expand or read additional meaning into the rule that is not expressly stated. *See Jerico Constr, Inc* v *Quadrants, Inc.,* 257 Mich. App. 22, 30; 666 N.W.2d 310; (2003). The Acorn Court cannot expand or read additional meaning into the rule because the parties were working within the framework of arbitration instead of having a bench trial or a trial by a jury. It must follow the plain language of the court rule. The court rule, MCR 2.403(O)(2)(c), plainly states a "verdict" is **a judgment entered as a result of a ruling on a motion after rejection of the case evaluation**. The trial court entered a judgment exactly as the court rule specifies on December 3, 2010. See Exhibit No. 8. As further noted on page 7 of this brief, there are multiple distinctions between an arbitration confirmation and the verdict entered by the trial court pursuant to Acorn's motion.

The Acorn Court then cites *Cusamono v Velger*, 264 Mich App 234, 690 N.W.2d 309 (2004) for the proposition that case evaluation sanctions were awardable following arbitration when the arbitration agreement provided that such sanctions shall apply.

However, even if the arbitration or appraisal agreement does not provide for case evaluation sanctions, MCR 2.403(O) lists what is a "verdict" entitling the prevailing party to case evaluation sanctions. Acorn reiterates its arguments above to distinguish the analysis in *Cusamono, supra*.

The Acorn Court also cites *Smith v Elenges* 156 Mich App 260, 263-264; 401 N.W.2d 342 (1986), to uphold its position that an arbitration award is not a verdict. In that case the Appeals Court held that a consent judgment was not a "verdict" as that term was used in WCCR 403.15, an early predecessor of MCR 2.403(O). However, there was no consent judgment in the instant case so this citation is not relevant.

The third case the Acorn Court cites is *Jerico Constr, Inc*, *supra* where the Appeals Court held that a stipulated order of dismissal entered on the basis of a settlement agreement did not constitute a "verdict" under MCR 2.403(O)(2). However, in the instant case there was no settlement agreement whatsoever so this citation also is not relevant. Acorn was forced to obtain an enforceable judgment before the Association would pay.

In addition, the courts have found that the case evaluation rule should be liberally enforced to encourage settlements and place the financial burden of resolution on the rejecting party. *Peterson v Fertel*, 283 Mich App 232 (2009).

Conclusion

Therefore, for the above reasons the trial court's rendering judgment on the appraisal award as a result of Acorn's motion for entry of judgment is a "verdict" under MCR 2.403(O)(2)(c), and Acorn is entitled to case evaluation sanctions.

II. Acorn Did Not Waive Its Claim for Debris Removal Expenses

A. The Policy Provisions Regarding Debris Removal

The policy states under Incidental Coverages No.2

Debris Removal-We pay for the cost to remove the debris of covered property after an insured loss. This includes the cost to remove volcanic ash, dust or particulate matter that causes direct physical loss to the property.

The policy further states that:

You may apply up to 25% of the limit that applies to the damaged property to cover debris removal. We will not pay more for direct loss to property and debris removal combined than the limit that applies to the damaged property. However when the covered loss plus the cost of debris removal is more than the applicable limit we will up to an extra 5% of the applicable limit to cover the cost of debris removal.

B. Coverage For Debris Removal and The Amount Are To Be Determined by The Trial Court

The Acorn Court ruled that Acorn erroneously characterizes its argument regarding debris removal expense as a coverage issue and contends that the Trial Court, rather than the appraisal panel should have determined the issue. The Acorn Court found that by Acorn submitting its case for appraisal, and proceeding through

the appraisal process without raising the issue of debris removal expenses, Acorn waived its claim for such expenses.

Waiver is the intentional relinquishment of a known right. In fact Acorn complained to the Umpire and to the Trial Court that the debris removal issue had not been addressed.

MCL 500.2833(1)(m) requires that every fire insurance policy issued or delivered in Michigan contain the following provision: "That if the insured and insurer fail to agree on the *actual cash value or amount of the loss*, either party may make a written demand that the amount of the loss or the actual cash value be set by appraisal." (Emphasis added). Debris removal is an incidental coverage of the insurance policy. It is not part of the appraisal statute which is just limited to findings of the actual cash value or the amount of the loss. The policy terms cited above refer to "direct loss" and "debris removal" The actual cash value or amount of the direct loss to the property was the only amount allowed to be determined by the appraisal panel . See exhibit No. 6, the Appraisal Award stating that the "Actual Cash Value Loss/Claim: $20.877.00."

According to Michigan law, It is well established that the question of arbitrability of a particular dispute is for the courts. *Kaleva-Norman-Dickson School Dist #6 v Kaleva-Norman-Dickson School Teachers' Ass'n*, 393 Mich 583, 587 (1975). Just as the trial court, not the panel, ordered Unfair Trade Practices Act interest of 12% a year, which was owed on the basis of the actual cash value judgment by the trial court of $20,877, an amount for debris removal expense could not be ordered until

the actual cash value award of $20,877 was made a judgment by the trial court. See terms of policy cited above.

The trial court had the authority to modify the appraisal panel's award with respect to issues not submitted to "arbitration" so long as the award could be corrected without affecting the decision on issues which were properly submitted. *Northern Michigan Education Asso. v. Board of Education*, 126 Mich. App. 781, 788 (1983).

The only issues that were properly submitted to the panel by statute, MCL 500.2833(1)(m), were the actual cash value or amount of the loss. The panel's award of the actual cash value or amount of loss would not be affected by the trial court determining the issue of debris removal. Therefore, the incidental coverage of debris removal and the amount could only be determined by the trial court and the trial court had the authority to modify the award under Michigan law.

The opinion of the appraiser Richard Guider that the Acorn Court quotes as to whether debris removal expense had been incurred is of no consequence since he had no authority under the statute, MCL 500.2833(1)(m), to determine anything but the actual cash value or the amount of the direct loss to the property.

Finally, the basis of the Umpire's position that the debris removal expense had not been incurred as required by the policy is a coverage question which is outside the purview of the appraisal panel. *Auto-Owners Ins. Co. v. Kwaiser,* 190 Mich. App. 482; *476 N.W.2d 467 (1991).*

C. Acorn Did Not Waive Debris Removal Expense

Acorn did not waive debris removal expense, as the Acorn Court determined, because Acorn did not have to raise the issue of debris removal coverage and expense until the award was made effective by a judgment of the trial court. See *Tokar supra.* In *Angott vs Chubb* Group Ins, 270 Mich App 47 (2006) the court said that in order for a party to waive its rights it must have intentionally and knowingly relinquished those rights. The court said it necessarily follows that conduct that does not express any intent to relinquish a known right is not a waiver, and **a waiver cannot be inferred by mere silence.** Waiver may be shown by proof of express language of agreement or inferably established by such declaration, act, and conduct of the party against whom it is claimed.

Since Acorn was not required to raise the issue of debris removal until a valid judgment confirming the award of $20,877 was entered by the trial court, Acorn's silence during the appraisal process did not waive its right to debris removal expense. In addition, as indicated by Acorn's counsel's letter to the umpire of the appraisal panel, Acorn was not silent on this issue.

Conclusion

For the above reasons the trial court should have determined the coverage and amount of debris removal expense not the appraisal panel. And, Acorn did not waive the issue of debris removal by not raising the issue during the arbitration process .

Relief

Acorn asks the Supreme Court to grant it leave to appeal the erroneous decisions of the Acorn Court because the opinion is scheduled for publication and will be precedent, therefore affecting the jurisprudence of the entire State of Michigan.

12/24/12

JAMES C. KLEMANSKI
Attorney for Plaintiff/ Appellant
2240 Livernois Rd.
Troy, Michigan
(248) 524-0000 X222